REMARKS/ARGUMENTS

Reconsideration of this application is respectfully requested.

In response to the rejection of claim 1 under 35 U.S.C. §112, second paragraph, claim 1 has been amended so as to eliminate the possible ambiguity. In addition, all of the pending claims have been reviewed and amended, where necessary, so as to improve their clarity and intelligibility.

Accordingly, all outstanding formal issues are now believed to have been resolved in the applicants' favor.

The continued rejection of claims 1, 3, 7-9, 11 and 15-23 under 35 U.S.C. §103 as allegedly being made "obvious" based on Ahuja '869 in view of Al-Ghosein WO '084 is again respectfully traversed.

The Examiner is thanked for the detailed "response to arguments" section bridging pages 2-4 of the last office action. Among other things, the Examiner responds to applicants' arguments as incapable of showing non-obviousness because the arguments attack the references "individually where the rejections are based on combinations of references."

Of course, since each claim must be considered "as a whole" under 35 U.S.C. §103, a *prima facie* case of obviousness also requires that the claimed subject matter be addressed as a whole and not subjected to piecemeal individual attacks on individual recitations. As a practical matter, whether one is considering a *prima facie* case of obviousness or a rebuttal thereto, one must necessarily address individual claim clauses and individual references asserted thereagainst as a part of analyzing the subject matter "as a whole" (or the asserted "combination" of references as a whole).

The case law cited by the Examiner is not to the contrary. Indeed, *In re Keller*, 642 F.2d 413 (CCPA 1981), involved two separate combinations of references. Each of two references (Keller and Berkovits) taught the entire claimed combination, except for the substitution of a digital timing circuit for an analog timing circuit. This was not rebutted at all by the applicant. The third reference that was used in combination separately with each of Keller and Berkovits taught an electronic timer. Applicant elected to submit rebuttal evidence only with respect to the third reference and neglected to adequately address whether or not the asserted combinations would have suggested the substitution of digital for analog circuitry to one of only ordinary skill in the art at the relevant time. The CCPA noted that the relevant test was not whether a suggestion to use digital timing in a cardiac pacer was found in the third reference (the only test applied in

rebuttal), but rather what the asserted combinations of references would have suggested to one of ordinary skill in the art (e.g., see 642 F.2d at 426).

The sentence adopted by the Examiner from *In re Merck & Co.*, 800 F.2d 1081 (Fed. Cir. 1986) similarly must be taken in context with the facts of that particular case. Once again, the Court here criticized the applicant for reading one of a combination of references in isolation, rather than for what it fairly taught in combination with the other cited art as a whole.

Appropriately, applicants herein have been directing their arguments against the asserted combination of references now at hand.

For example, as noted in applicants' earlier remarks, the here-claimed invention requires, *inter alia*, a separate information-collating monitor module together with current operation data from the server modules and to provide that monitored accumulated information to the client module (e.g., via the control intermediary or "proxy" of the client module). Both of these features are important and, as claimed, it is clear that they are provided by a separate information-collating monitor module that does not form a part of any server module or client module.

The Examiner asserts that Ahuja discloses a module with information-collating features – albeit in a client-side load balancing system. However, as the Examiner has

already recognized, Ahuja does not disclose any client-side control intermediary (e.g., proxy associated with a client) as receiving status information from a separate information-collating monitor module. To supply this admitted deficiency, the Examiner relies upon Al-Ghosein which is asserted to teach an information-collating module separate from a module implementing a load-balancing engine. It is respectfully submitted that the Examiner's understanding of this asserted combination is clearly erroneous.

The collective metric data store 504 shown in Fig. 7 of Al-Ghosein is explicitly depicted as being co-located with the load-balancing engine 62 in a single instantiation of the load-balancing service 502 – which is also depicted explicitly as being co-located with router computer 70.

Furthermore, Al-Ghosein is explicitly directed solely to object load-balancing. In particular, Al-Ghosein is directed towards object creation requests and attempts to balance the load of a particular object class being sent to a server in a target group, etc. (e.g., see page 22, line 19). As those in the art will appreciate, this is a considerably different environment than the Ahuja techniques for load-balancing Web server allocations. Furthermore, the Ahuja techniques are specifically and explicitly directed to

client-side techniques, while Al-Ghosein appears to teach object-creation load-balancing techniques only at a router.

In considering the combined teaching of an asserted combination of references "as a whole," one must never ignore explicit teachings of either reference. Those having only ordinary skill in the art at the relevant time (e.g., without any hindsight influence whatsoever of the applicants' own teaching) can never be assumed to ignore explicit contrary teachings of any of the "combined" references.

The applicants have not merely recognized another advantage of a pre-existing prior art arrangement which would flow naturally therefrom. The applicants have described and claimed a novel and non-obvious combination that provides additional advantages that do not flow naturally from the asserted combination of references.

The Examiner's discussion of other aspects of applicants' earlier-presented arguments neglects to consider those arguments in full and in context. To the extent that Ahuja bases load-balancing decisions on only locally generated server load data (i.e., without the benefit of a completely separate monitor module whose dedicated purpose is to constantly maintain current load information from the servers), such is a teaching that is directly contrary to the applicants' claimed invention. Applicants have never argued that Ahuja is not at all directed to load-balancing of Web server allocations. Ahuja

simply uses a quite different system and method for doing so. The applicants have described and claimed a different and improved load-balancing system/method.

The Examiner asserts that one of only ordinary skill in the art at the relevant time "would have been motivated to modify the client-side agent taught in Ahuja with the separate load balancing engine and metric collector taught in Al-Ghosein." However, it is respectfully submitted that such a modification would be contrary to the Ahuja teachings – and, in any event, the only load-balancing engine/metric collectors taught in Al-Ghosein are integral parts of but a single load-balancing module in a router.

In the Examiner's attempt to make this combination seem rational, it is further stated that such combination would have been obvious "because doing so 'provides a dampening of variance typical in processing metric data' (Al-Ghosein, page 3, line 35 – page 4, line 1) and allows for multiple load-balancing engines (Al-Ghosein, page 23, lines 7-8)."

However, the Examiner's quotations from Al-Ghosein neglect to mention that the quoted passage at pages 3-4 relates to object creation requests being loosely coupled with logic observing processing metrics so as to avoid load-balancing engines considering anomalous observations – in the context of the exemplary embodiment therein where the load-balancing service is collected together into a unitary module 502 at the router

computer 70. The passage at page 23 is again referring explicitly to the system configuration depicted at Fig. 7 where the collective metric data store 504 and the load-balancing engines 62 and 64 are all in an integrated, unitary, single module load-balancing server 502 located at router computer 70.

The Examiner also relies upon Ahuja, claim 1, which states that the client agent utilizes additional information received from an entity associated with a server pool. The Examiner interprets this to suggest a separation of elements and/or the desirability of such a separation. However, the actual language quoted from client 1 in Ahuja does not suggest a separation of the "entity associated with the server pool." If anything, it suggests that this "entity" would be part of the server pool.

The Examiner's discussion of claim 7 is not understood since claim 7 was cancelled in the previous amendment.

With respect to claim 8, the Examiner relies upon Ahuja, col. 12., lines 30-33. However, this does not address the deficiencies already noted for parent claim 1. Further, this passage refers to the "pricing manager implemented at the server site" – rather than a separate information-collating monitor module.

The Examiner's discussion of claim 11 is also not understood because this claim was cancelled by earlier amendment.

Furthermore, the Examiner's cross-reference to an alleged discussion of claim 3 is not understood since the Examiner does not include any discussion of claim 3.

Claim 19 has been cancelled above as being substantially duplicative of claim 18.

Given the fundamental deficiencies of both of the cited references and the attempted combination thereof as noted above, it is not believed necessary at this time to detail additional deficiencies of this allegedly "obvious" combination of references with respect to other aspects of the rejected claims.

The rejection of claims 2, 4-5, 10 and 12-13 under 35 U.S.C. §103 as allegedly being made "obvious" based on Ahuja/Al-Ghosein in further view of Stricek is also respectfully traversed.

Fundamental deficiencies of Ahuja/Al-Ghosein have already been noted above with respect to parent claims. Stricek does not supply those deficiencies.

Of course, Stricek does teach the use of a "reverse proxy." Applicants have never claimed to be the first to use a "proxy" as part of a client module. However, the rejected claims define additional functionality of the "control intermediary" in the claimed context which, when considered "as a whole" (as they must be under 35 U.S.C. §103), defines a novel arrangement/utilization for a proxy server.

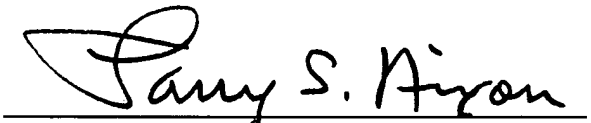
The Examiner alleges that all three references are "analogous" as "both [sic] cover load balancing and fault tolerance across a server pool by means of an intermediary control module." Actually, Stricek does not appear to have anything whatsoever to do with load-balancing or fault tolerance across a server pool. Instead, Stricek appears to be concerned primarily with security/defenses against hacker activity.

In any event, Stricek does not supply the above-noted deficiencies of Ahuja/Al-Ghosein.

Accordingly, this entire application is now believed to be in allowable condition, and a formal notice to that effect is earnestly solicited.

Respectfully submitted,

NIXON & VANDERHYE P.C.

By: 

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